

SENATE BILL REPORT

ESSB 5728

As Passed Senate, February 10, 2004

Title: An act relating to civil liability reform.

Brief Description: Providing for omnibus civil liability reform.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Brandland, McCaslin, T. Sheldon, Deccio, Schmidt, Parlette and Hale).

Brief History:

Committee Activity: Judiciary: 2/19/03, 2/27/03 [DPS, DNP].

Passed Senate: 3/14/03, 28-21; 2/10/04, 27-22.

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5728 be substituted therefor, and the substitute bill do pass.

Signed by Senators McCaslin, Chair; Esser, Vice Chair; Brandland, Haugen and Johnson.

Minority Report: Do not pass.

Signed by Senator Kline.

Staff: Lidia Mori (786-7755); Aldo Melchiori (786-7439); Jinnah Rose McFadden (786-7421)

Background: Joint and Several Liability: In 1986, the Legislature abolished traditional joint and several liability and adopted proportionate share liability. When making a determination of liability in tort actions involving negligent or reckless acts or omissions, a jury decides the percent of fault of each entity connected to the action. The percent of fault attributed to an entity is recoverable if that entity: 1) is a party to the action; 2) has had judgment entered against them; 3) does not have a claim of immunity; and 4) has not entered into a release with the plaintiff. Each entity is responsible for its percent of fault, as adjudged by the jury. Judgments entered against entities with immunity are unrecoverable, as are judgments entered against parties that have been released by the plaintiff. Intentional torts are not included in this scheme. While several liability is the general rule, exceptions exist holding defendants jointly and severally liable for the sum of their proportionate liability.

Employment Reference: A person who provides negative information about a current or former employee to a prospective employer may be sued for defamation by the affected employee. An employer providing the employment information is entitled to a "qualified privilege." To establish this privilege, an employer must show that he or she reasonably believed the information to be true and acted "in good faith." A person claiming defamation can defeat the privilege by showing that (1) he or she was harmed by information provided; (2) the information provided was false; and (3) the employer knew it was false or displayed reckless disregard for its falsity.

Postjudgment Interest Rate: Civil judgments, generally, bear at a rate that does not exceed the higher of: (a) twelve percent per annum; or (b) four percentage points above the equivalent coupon issue yield (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for 26 week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate.

Medical Liability: State law governs many areas of tort actions for claims of medical malpractice. The time period during which a medical malpractice action may be brought is limited by statutes of limitations and repose. A statute of limitations provides that a claim may be brought during a specified time period after an injury occurs. A statute of repose terminates the right to bring an action after a specified time period, even if the injury has not yet occurred. Washington's statute of repose, which has been held to be unconstitutional, requires that a medical malpractice action be brought within eight years of the act or omission, or one year after the injury was discovered, whichever period is longer. Under certain circumstances, the time for bringing an action may be tolled, in which case the action must be brought within one year of actual knowledge.

The standard of proof in medical malpractice actions is preponderance of the evidence; each fact must be proven to be more probable than not, or more convincing than the evidence which is offered in opposition to it. This standard also applies when rebutting evidence that informed consent to treatment was given by the plaintiff.

Additionally, state law authorizes 1) a party to present evidence that the patient has been compensated for his or her injury from other sources, except the patient's assets or insurance; 2) parties to provide, by contract, that controversies will be submitted to arbitration; and 3) periodic payments of future economic damages, when awards exceed \$100,000.

Construction Liability: An injured party may bring a cause of action or claim arising from the construction, alteration, repair, design, planning, survey, or administration of any improvement on real property. The basis for the cause or claim must occur within six years after substantial completion of construction or termination of construction, whichever is later.

Seatbelt Defense: Current law pertaining to the failure to wear a seatbelt was enacted in 1986. The failure to wear a safety belt assembly is not admissible as evidence of negligence in any civil action.

Governmental Activities: At common law, governments are immune from all lawsuits. Sovereign immunity was waived by Washington in 1961 and, since that time, immunities have been gradually reduced by the courts. Cases involving high-speed police chases, vulnerable adults, and crimes by parolees represent some of the legal actions in which state immunities have been judicially reduced. Tort claim payouts have risen dramatically, ranging from a little over \$100,000 in 1964 to between \$10,000,000 and \$30,000,000 in each of the last ten years, with a record payout in 2001 of \$80,000,000. Factors that may contribute to higher tort costs include the state choosing to operate high-risk programs, liability for the conduct of people not under direct state control, increased litigation, and a national trend toward higher jury awards. Tort judgments and settlements are paid from a nonappropriated liability account

which is funded by premiums assessed against state agencies. The state plans to pay \$144 million into the liability account in 2001-2003.

Summary of Bill: Joint and Several Liability: Intentional acts or omissions are added to the definition of fault used by juries in determining proportionate shares of liability. Two new limitations are placed on the exceptions holding defendants jointly and severally liable: (1) where a defendant is liable for negligent or reckless acts or omissions, that defendant is jointly liable for up to twice the percent of fault allocated to him/her, but in no case more than 100 percent of the sum of the proportionate shares of the total damages; and (2) where a defendant is liable for intentional acts or omissions, that defendant is jointly liable for 100 percent of the sum of the proportionate shares of the total damages.

Employment Reference: An employer who discloses information about a current or former employee's job performance or other work-related information to a prospective employer is presumed to be acting in good faith and is immune from civil liability. The good faith presumption may only be rebutted by clear and convincing evidence that the information disclosed was knowingly false or deliberately misleading.

Postjudgment Interest Rate: The interest rate of 2 percent above the Federal Reserve T bill rate index applies to judgments founded on tortious conduct of the state, its subdivisions, and individuals. Interest on the judgment, or the portion affirmed on appeal, accrues from the date of the trial court verdict. Legal financial obligations in criminal cases accrue interest at the rate of 12 percent or 4 percent above the Federal Reserve T bill rate index, whichever is higher. For cases not involving tortious conduct, unpaid child support, or judgments founded on written contracts, the judgments accrue interest at the rate of 12 percent or 4 percent above the federal reserve T bill rate index, whichever is higher.

The interest rates apply to judgments entered on or after the effective date of the act. The State Treasurer computes the interest rates each month and they are published in the Washington State Register.

Medical Liability: In no event may a medical malpractice action be commenced more than three years after the act or omission, unless there is proof of fraud. No medical malpractice action may be commenced unless the defendant has been given at least 90 days' notice. The Washington State Supreme Court rules implementing mandatory mediation may not provide any exception to the mandatory mediation requirement. In an action or arbitration for damages for injury or death occurring as a result of health care, the total amount of noneconomic damages may not exceed \$350,000. This cap takes effect upon the ratification of a constitutional amendment if the Washington State Supreme Court holds the cap unconstitutional.

Any party may present evidence of compensation from another source. If the evidence is admitted, then the other party may present evidence of any amount paid for the right of compensation. Absent statutory authority, there is no right of reimbursement from a plaintiff's recovery with respect to collateral sources.

It is clarified that a contract for health care services containing an arbitration provision is not a contract of adhesion, nor unconscionable, nor otherwise improper. A court's authority to award periodic payments of future damages is expanded to include noneconomic damages.

The amount of the award necessary for periodic payments to be ordered is lowered to those in excess of \$50,000.

The Department of Health, in conjunction with the State Medical Quality Assurance Commission and appropriate professional associations, must evaluate the effectiveness of the quality improvement and medical malpractice prevention program, as implemented in state hospitals. By December 1, 2003, a report must be provided to the Legislature.

Construction Liability: Eight new affirmative defenses are created in regard to actions or claims arising from the construction, alteration, repair, design, planning, survey, or administration of any improvement on real property: (1) to the extent damage is caused by an unforeseen act of nature that caused, prevented, or precluded the activities; (2) to the extent it is caused by a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner; (3) to the extent it is caused by the homeowner or his or her agent, employee, subcontractor, independent contractor, or consultant by their failure to follow the builder's or manufacturer's maintenance recommendations, or commonly accepted homeowner maintenance; (4) to the extent it is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose; (5) to the extent that a cause of action does not accrue within the statute of repose or is not filed within the applicable statute of limitations and, regardless of discovery in contract cases, within six years after substantial completion of construction, or during the period within six years after the termination of the services, whichever is later; (6) as to a particular violation for which the builder has obtained a valid release; (7) to the extent that the builder's repair corrected the alleged violation or defect; and (8) to the extent that the builder made the improvements in conformity with all applicable codes.

Seatbelt Defense: The failure to wear a seat belt or the failure to ensure that all child passengers under the age of 16 years are wearing a seat belt or are fastened into an approved child restraint may be admissible as evidence of negligence in any civil action.

Governmental Activities: Local government entities, and their officers, employees, or volunteers, are not liable to pay a claim or judgment for noneconomic damages by any one person that exceeds \$1,000,000 or any claim or judgment that, when totaled with all other claims or judgments arising out of the same incident, exceeds \$2,000,000. That portion of the judgment claimed against the local government entity that exceeds these amounts may be reported to the local legislative authority and paid in whole or in part by act of the local legislative authority. In cases in which the local government entity or its officers, employees, or volunteers are held liable for civil damages resulting from any negligent act or omission in the rendering of community placement, community supervision, community custody, parole supervision, probation supervision, or supervision of suspended sentences and the offender under supervision has previously been convicted of rape or murder and commits a crime of rape or murder while under supervision, these provisions do not apply.

Rural public hospital districts and their officers, employees, or volunteers are not liable to pay a claim of judgment by any one person that exceeds the sum of \$500,000 or any claim or judgment that, when totaled with all other claims or judgments arising out of the same incident or occurrence, exceeds the sum of \$1,000,000. That portion of the judgment that

exceeds \$500,000 may be reported to the local legislative authority and paid in whole or in part by act of the local legislative authority.

The state and its agencies, institutions, officers, employees, or volunteers are not liable to pay a claim or judgment for noneconomic damages by any one person that exceeds \$1,000,000 or any claim or judgment that, when totaled with all other claims or judgments arising out of the same incident, exceeds \$2,000,000. That portion of the judgment claimed against the state that exceeds these amounts may be reported to the state and paid in whole or in part by legislative appropriation. In cases in which the state or its agencies, institutions, officers, employees, or volunteers are held liable for civil damages resulting from any negligent act or omission in the rendering of community placement, community supervision, community custody, parole supervision, probation supervision, or supervision of suspended sentences and the offender under supervision has previously been convicted of rape or murder and commits a crime of rape or murder while under supervision, these provisions do not apply.

Miscellaneous: A person initiating an action for personal injury, wrongful death, or damage to property, in which harm is alleged to have been caused by an act which violates the appropriate standard of care to be exercised by a person licensed, certified, or registered by the state under Title 18 or 19 RCW or by the Supreme Court, is required to serve an affidavit on the defendant within 90 days of starting the action. The affidavit must be executed by a person with a license, certification, or registration identical to the defendant and with at least five years of professional experience in the same vocation as the defendant. The person must also have no financial interest in the outcome of the action. The affidavit must contain a statement that the person making the affidavit believes there is a reasonable probability that the defendant's conduct does not meet the required standard of care.

Appropriation: None.

Fiscal Note: Requested on February 18, 2003.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: Joint and Several: It is unfair for a defendant who is deemed 1 percent liable to be held 100 percent responsible for the total money damages. **Employment References:** It is routine policy for employers, who are called for reference checks, to limit their remarks about a former employee to simply verifying the dates the employee was employed because of fear of being sued. **Postjudgment Interest Rate:** Exorbitant interest rates on large judgments force cities to settle cases they might otherwise appeal. **Medical Liability:** Tort reform will bring the cost of insurance down dramatically. If noneconomic damages are capped, there will be no incentive to take cases to trial and the settlement process will be sped up. Injured parties will get relief much faster than through a court proceeding and will retain more of their settlement if attorneys' contingency fees are limited. **Construction Liability:** Insurance coverage for the construction industry, especially for condominiums, is not as available as it once was and what policies that do exist have too many exclusions to be useful. High insurance rates trickle down to consumer costs. **Seatbelt Defense:** Juries should be able to consider the issue of whether the parties were wearing their seatbelts. **Governmental Activities:** If cities have to do away with probation due to exposure for liability, the citizens are more at risk. The needs of communities must be balanced with the needs of individual victims.

Testimony Against: Joint and Several: Abolishing the joint and several liability exception is a fundamental attack on the jury system and awards wrongdoers. If only several liability is applied, an innocent plaintiff is left to bear the burden of that percent of fault apportioned to the judgment-proof wrongdoer. Additionally, it is important to remember that wrongdoers held jointly and severally liable may seek contribution from one another. Employment References: This measure makes Washington the most employer protective state in the union and takes away employee rights. A recent study done on defamation cases based on employment reference checks showed only 16 cases, four of which resulted in damages. Postjudgment Interest Rate: The 12 percent interest rate discourages frivolous appeals. Plaintiffs are already paying significant interest on the bills left unpaid as their case proceeds. Medical Liability: Statistics show that tort damages have decreased over the last five years and payouts are significantly down in medical malpractice cases. Making the standard of review "clear, cogent, and convincing" serves as a virtual bar to medical malpractice claims. Capping noneconomic damages punishes innocent plaintiffs. If damages are capped at \$250,000, the threat of a lawsuit is significantly reduced and insurance companies will have little incentive to pay reasonable damages or settlements to injured parties. Studies show MICRA did not decrease rising insurance rates in California. Construction Liability: The construction section does not make it clear that it does not relate to personal injury claims. Seatbelt Defense: If a person is hit at 80 miles an hour by a drunk driver, the fact that he or she was not wearing a seat belt should not take away from the fault of the drunk driver. Government Activities: The need to show "only slight care" is an attack on government accountability and an attack on the jury system.

Testified: PRO: Doug McDonald, WSDOT Secretary; Dan Titterness, Jefferson County Commissioner; Steve Lowe, Franklin County Prosecutor; Don Davidson, Bellevue City Council member; Carolyn Logue, NFIB; Donald Root, small business owner; Don Brunell, AWB; Leroy Rhode, WA State Residential Care Council; Duke Schaub, AGC of WA; CON: Larry Shannon, WSTLA; John Budlong, WSTLA; Robby Stern, WSLC; Lonnie Johns Brown, WA Coalition of Sexual Assault Programs; Jenny Weiland, Families & Friends of Violent Crime Victims; Kevin Underwood, WA Collector's Assn; David Grimm, WA Collector's Assn.